IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3092 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

APPOLLO TYRES LIMITED

Versus

UNION OF INDIA

Appearance:
MR VIKRAM NANKANI with MR UDAY JOSHI, learned Counsel for M/S TRIVEDI & GUPTA for Petitioners
MR MUKESH R SHAH, Addl. Standing Counsel for Respondent Nos. 1, 2, 3, 4

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 26/04/2000

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The petitioners seek a writ of mandamus on the respondent to refund the amount of Rs. 30 lakhs to them, together with interest thereon at the rate of 24% per annum from the date of payment by the petitioners, until such refund is given, on the ground that the said amount was furnished by way of cash security in respect of the provisional release of goods and that the said amount not having been adjusted in the determination made under the Kar Vivad Samadhan Scheme, was required to be refunded to the petitioners.

2. A demand notice was issued on 6th August, 1996, on the petitioner No.1 company, which culminated in the order dated 12th August, 1998, issued by the Commissioner of Central Excise (Adjudication) Mumbai, by which duty amounting to Rs. 12,68,52,778/- demanded as per paragraph 15(i) of the Show Cause Notice dated 6th August, 1996 was confirmed under Section 11A of the Central Excise Act, 1944, and amount of Rs. 1,15,00,000/already paid by the petitioner company on 8th March, 1996, 19.3.1996 and 5.6.1996 under TR-6 Challan Nos. 290, 300 and 52 respectively, was ordered to be adjusted against the said amount of duty. A penalty amount of Rs. 13 crores was imposed under Rule 173Q of the Central Excise Rules, 1944, read with Section 11AC of the said Act on the petitioner company and a penalty of Rs. 10 lakhs was imposed on the Vice-Chairman and Managing Director of the petitioner company under Rule 209A of the said Rules. Further, penalties of varying amounts were also imposed under Rule 209A of the Rules on other persons of the petitioner company, named in the said order. The goods, namely, 5776 tyres valued at Rs. 1,65,22,470/- seized were ordered to be confiscated by the said order, under the provisions of Rule 9(2) and Rule 173Q of the said Rules.

2.1 After the seizure of these goods they were provisionally released to the petitioner company on B-11 bond against cash security of Rs. 30 lakhs with a direction to the petitioner company to account for the seized goods in the statutory records. Since the goods were therefore not available for confiscation, the Commissioner of Central Excise imposed a fine of Rs. 50 lakhs in lieu of confiscation under the said order. The petitioner assessee was directed to account for these goods in statutory records and clear them on payment of duty, if not already paid. The fine imposed was ordered to be adjusted from the cash security and the balance of Rs. 20 lakhs was required to be paid by the petitioner -

assessee forthwith. Statutory interest was directed to be paid in accordance with Section 11AB of the said Act.

2.2 The amount of Rs. 30 lakhs in respect of which the present petition has been filed, was the amount which was adjusted towards the fine from the cash security of Rs. 30 lakhs which was given by the petitioner for getting the goods provisionally released. Therefore, on the date of the said order dated 12th August, 1998, the sum of Rs. 30 lakhs of cash security stood adjusted towards the amount of fine of Rs. 50 lakhs, which was imposed in lieu of confiscation.

2.3 The order of the Commissioner (Adjudication) was challenged by way of an appeal before the CEGAT on 27th August, 1998. On 1st September, 1998, the Government introduced Kar Vivad Samadhan Scheme, 1998. In the Stay Application which was filed by the petitioner company, the CEGAT gave a direction to it on 17.10.1998, to deposit a sum of Rs. 2.80 crores within two months as a condition for entertaining the appeal. The petitioner company however, sought extension of time for making the pre-deposit, which was allowed by the CEGAT on 21.12.98. On 30.12.1998, the petitioner made a declaration under the Kar Vivad Samadhan Scheme of 1998, in respect of the "tax arrears". The declaration was accepted as per the intimation under Section 90(1) of the Finance (No.2) Act, 1998, stating that the Designated Authority after consideration of the relevant material, determined the amount mentioned therein payable by the declarant towards full and final settlement of their "tax arrears" covered by the declaration. The balance of the amount of "tax arrears" declared in Form 1B was shown to be Rs. 11,53,52,778/-. The amount determined as payable under Section 88(f)(ii) of the Finance (No.2) Act, 1998 was Rs. 5,76,76,389/-. The other items which were shown under the head `amount of tax arrears' were of penalty of Rs. 13 crores and the balance of fine of Rs. 20 lakhs after deducting Rs. 30 lakhs from the total fine of Rs. 50 lakhs, as the amount already paid. Thus, in the order of determination itself the amount of Rs. 30 lakhs which was adjusted towards fine under the Order-in-Original was shown as the amount already paid up.

2.4 Under the determination dated 18.1.1999 (annexure "B") made by the Designated Authority, the amount was required to be paid within thirty days. Admittedly, the petitioner company deposited the aforesaid amount of Rs. 5,76,76,389/- under challan dated 16.2.1999 (annexure "C" to the petition) as was required to be done under the

Scheme. Thereafter, on 17.2.1999, the petitioners addressed a letter to respondent No.2 seeking refund of the amount of Rs. 30 lakhs, which demand was reiterated in a legal notice issued by the petitioners on 9.3.1999.

3. In the background of these facts, it was contended on behalf of the petitioners that the petitioner company was entitled to the refund of Rs. 30 lakhs because under the provisions of Section 88(f) of the said Finance Act, which related to settlement of tax, sub-clause (ii) contemplated waiver of fine, penalty and interest on payment of 50 per cent of the amount of duties or cess due or payable on the date of making of the declaration. The learned Counsel appearing for the petitioners contended that since tax arrears on account of fine, penalty or interest were not required to be considered because Section 88(f)(ii) of the Act confined the liability only to 50 percent of the duty amount, the consequence was that the petitioner company stood wholly absolved of the liability on account of fine, penalty and interest payable under the Order-in-Original as if they were never imposed. It was argued that payment of 50% of duty under sub-clause (ii) of Section 88(f) had the effect of the waiver of the entire liability as regards fine, penalty and interest under the Order-in-Original and therefore, the petitioner company was entitled to the refund of Rs. 30 lakhs, even if under the order of the Commissioner it was adjusted towards the fine imposed in lieu of confiscation. It was also contended that just as the amount of duty which was already paid was adjusted as shown in the certificate of determination of liability under the Scheme, even the said amount of Rs. 30 lakhs ought to have been adjusted against the liability determined under the Scheme. It was contended that the amount of Rs. 30 lakhs was given by way of cash security and therefore, it cannot be said that the declarant had voluntarily paid that amount as duties, interest, fine or penalty as contemplated by the Explanation to sub-clause (ii) of Clause (m) of Section 87 which defines "tax arrears."

4. The learned Standing Counsel appearing for the respondents, relying upon the provisions of the Scheme submitted that the amount of fine being adjusted under the Order-in-Original was no more a remaining unpaid amount and therefore, it could not be the subject matter of determination under the Scheme. It was submitted that after the amount determined under the Scheme was deposited under the challan dated 16.2.1999 by the petitioner company, no such dispute as is now sought to be raised, could have been raised, having regard to the provisions of the Scheme. It was submitted that there

was no compulsion on the part of the petitioner company to submit to the Scheme, but once having submitted to the Scheme and having made the payment, a dispute of this nature cannot be now agitated. It was argued that if the petitioner had made any such insistence, the declaration could not have been accepted and the petitioner would have had to pay the penalty of Rs. 13 crores as well as the balance amount of fine of Rs. 20 lakhs besides the entire duty amount. The learned Counsel referred to the letter dated 29th December, 1998 of the petitioner forwarding the declaration which was filed on 30.12.1998 and pointed out that in that letter itself, the petitioner company had stated that it had not claimed the benefit of amount of Rs. 30 lakhs deposited as cash security. The company had in the said letter stated that the said amount may be reduced from the settlement amount finally decided by the Commissioner. The learned Counsel also drew our attention to the communication dated 24.3.1999 addressed by the Department to the petitioner company in context of its claim for refund and pointed out that according to the department, the amount of Rs. 30 lakhs was already appropriated against fine, under the Order-in-Original of the Commissioner and that it was specifically mentioned in the order of the Commissioner that the amount of Rs. 20 lakhs of fine remained outstanding. In that letter, the petitioner was informed that these facts were brought out expressly while issuing intimation of settlement amount in Form 2B. It was also stated that while issuing the form No.2B, the petitioners' letter dated 29.12.1998 was considered and it was found that adjustment of an amount of Rs. 30 lakhs as requested by the petitioner company was not admissible under the provisions of the Scheme. The petitioner company was also informed that there was no bar on it against withdrawing the declaration if the settlement was not acceptable to the petitioner company, because the KVSS was a voluntary scheme. However, once the settlement was reached and the orders were made, they became conclusive and could not be reopened in view of the provisions of Section 90(3) of the Act.

5. The facts pose a short question before us as to whether the amount of Rs. 30 lakhs which was initially paid by way of cash security for getting the goods provisionally released and appropriated towards fine under the adjudication order, was required to be refunded by the Department to the petitioner, after the making of the determination under the Kar Vivad Samadhan Scheme. There is no dispute about the fact that the said amount of Rs. 30 lakhs came to be adjusted towards the fine under the Scheme, which was imposed under the

Order-in-Original dated 12.8.1998 issued by the Commissioner. Therefore, much prior to the filing of the declaration, the said amount stood as amount paid-up towards a part of the fine, which was imposed on the petitioner company.

6. The relevant provisions of the Kar Vivad Samadhan Scheme, which have fallen for our consideration are reproduced as under:-

Section 87 (m) "tax arrears" means, -
(i) xxxxx..... xxx.....
(ii) in relation to indirect tax enactment.-

(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998, but remaining unpaid as on the date of making a declaration under Sec. 88 or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under Sec.88.

but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrears shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation : Where a declarant has already paid either voluntarily or under protest, any amount of duties,

cesses, interest, fine or penalty specified in this sub-clause on or before the date of making a declaration by him under Section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause;"

Section 88. Settlement of tax payable

"Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of Sept. 1998 but on or before the 31st day of Dec. 1998, a declaration to the Designated Authority in accordance with the provisions of Section 89 in respect of tax arrear, then notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under the Scheme by the declarant shall be determined at the rates specified hereunder, namely:-

(a) to (e) xxx xxx
(f) where the tax arrear is payable under the indirect tax enactment -

(i) in a case where the tax arrear comprises fine, penalty or interest but does not include duties (including drawback of duty, credit of duty or any amount representing duty) or cesses, at the rate of fifty per cent, of the amount of such fine, penalty or interest, due or interest, due or payable as on the date of making a declaration under Sec. 88,

(ii) in any other case at the rate of fifty per cent, of the amount of duties (including drawback of duty, credit of duty or any amount representing duty) or cess due or payable on the date of making a declaration under Sec. 88."

Section 90(3) -

"Every order passed under sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter

covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force."

Section 93. No refund of amount paid under the Scheme.

"Any amount paid in pursuance of a declaration made under Section 88 shall not be refundable under any circumstances."

7. Under Section 87(m)(ii), the expression "tax arrears" in relation to indirect tax enactment means amount of duties, cess, interest, fine or penalty determined as due or payable under the indirect tax enactment as on 31st March, 1998 or which constitute the subject matter of a demand notice or a show cause notice issued on or before 31st March, 1998 under that enactment, but remaining unpaid as on the date of making a declaration under Section 88. The amount of Rs. 30 lakhs which was adjusted towards fine much prior to the making of the declaration cannot be said to be an amount remaining unpaid as on the date of making of the declaration. Therefore, that amount did not form part of the "tax arrears" in respect of which determination was to be made under the Scheme. The Explanation to sub-clause (ii) of Clause (m) of Section 87 refers to payments made by the declarant, voluntarily or under protest, of any amount of duty, interest, fine or penalty on or before making of the declaration and lays down that such payments as well as deposit made pursuant to the order pending an appeal, shall not be deemed to be the amount paid for the purpose of determining tax arrear. Retorting to this explanation, it was contended on behalf of the petitioners that it did not cover security. This contention cannot be accepted in view of the fact that since the cash security was already appropriated towards fine, that amount cannot thereafter be treated as cash security. In fact, the explanation clearly supports the idea that it is only the amounts which remained unpaid that can be considered as "tax arrears" for the purpose of determination under the Scheme and that what was paid up and recovered, was not to constitute the subject matter of any such determination.

7.1 The contention that under Clause (f)(ii) of Section 88, which relates to settlement of tax payable, prescribing the rights at which the liability under the

Scheme is to be imposed, had the effect of obliterating the initial liability from the Order-in-Original as regards penalty, interest or fine as if they were never imposed, is wholly misconceived. This submission overlooks the meaning of the expression "tax arrear", which, as noted above, does not include any amount which has been paid up or recovered. The expression "tax arrears" includes only the `remaining unpaid amount', which means that it contemplates a situation where a part of the liability may have been already discharged either by voluntary payment or by recovery. Therefore, an amount of fine which was already recovered would not reckon for consideration as tax arrear in determining the liability under sub-clause (ii) of Clause (f) of Section 88, which is 50 per cent of the duty amount on the payment of which the benefit of not paying the penalty, interest or fine remaining unpaid would accrue to such assessee. This surely will not have the effect of reviving any claim to recover any amount of penalty, fine or interest which is already paid up.

7.2 It will be noted from the provisions of Section 90(3) that every order passed under sub-section (1) determining the sum payable under the Scheme is treated as conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the tax enactment in question or under any other law for the time being in force. In the present case, admittedly there is a reference to the amount of Rs. 30 lakhs which was treated as fine paid up, in the order of determination dated 18.1.1999 at annexure "B" to the petition. Therefore, while making the order, the amount of Rs. 30 lakhs was considered and taken to be an amount already paid up as fine and only the balance of Rs. 20 lakhs out of the total fine imposed of Rs. 50 lakhs was shown as the amount outstanding as fine. Since this aspect was already taken into consideration in the order determining the sum payable under the Scheme, it was not at all open for the petitioner company to agitate any claim in respect of that amount of Rs. 30 lakhs, which was treated as fine already paid up.

7.3 The contention raised on behalf of the petitioners is that on making of the order of determination, determining the payment under the Scheme, the Order-in-Original stands cancelled and therefore, whatever liabilities were imposed such as penalty, fine etc. stand revoked. This stand is erroneous for the simple reason that as provided in Section 90(ii) of the said Act, when an order is made under sub-section (ii) of

Section 90, by the Designated Authority, then any appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (ii) of Section 90 is passed. This would mean that when the dispute as regards "tax arrears" which is the amount remaining unpaid on the date of the declaration is resolved by making the order determining the sum payable under the Scheme, the challenge against the order by way of appeal, stands withdrawn. Therefore, as regards the amounts which are already paid up under that order and were not the subject matter of the tax arrears as defined under the Scheme, the assessee cannot raise any challenge since the appeal stands withdrawn. Therefore, far from the entire original order being withdrawn or nullified as contended by the learned Counsel, the effect of withdrawal of the appeal would be to treat it as already executed to the extent to which the payments due under that order are already made and to treat the dispute as regards amount remaining unpaid as settled by the order of determination made under the Scheme. It cannot be inferred from the provision of sub-clause (ii) of Clause (f) of Section 88 that because in cases where there is duty as well as fine, penalty and or interest payable under the order, payment of 50 per cent of duty invested under the clause would entitle the assessee to recover the amounts which have already been paid up by way of penalty, fine or interest. Such an interpretation is not at all warranted by the wordings of the said provision and, if imposed, it will fly in the face of the provisions of the Scheme which is intended to cover only the "tax arrears" which as defined, are confined only to the amounts remaining unpaid as on the date of declaration, thereby excluding the amounts which have been paid up.

8. In this view of the matter, we find that there is no substance in the contentions raised on behalf of the petitioners and the petitioner company is not entitled to any of the reliefs prayed for by it in the petition. This petition is therefore, rejected. Notice is discharged with no order as to costs.

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